

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

LISA M.,

Plaintiff,

Civil Action No.
5:19-CV-0764 (DEP)

v.

ANDREW M. SAUL, Commissioner of Social
Security,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

LACHMAN, GORTON LAW FIRM
P.O. Box 89
1500 East Main Street
Endicott, NY 13761-0089

PETER A. GORTON, ESQ.

FOR DEFENDANT

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Special Assistant U.S. Attorney

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the Commissioner of Social Security, pursuant to 42 U.S.C. §§ 405(g) and

1383(c)(3), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on June 23, 2020, during a telephone conference conducted on the record. At the close of argument I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner's determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court's oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby

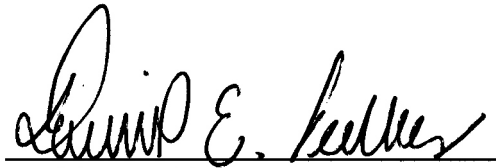
ORDERED, as follows:

1) Defendant's motion for judgment on the pleadings is GRANTED.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: June 29, 2020
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

-----x
LISA M.,

Plaintiff,

vs.

3:19-CV-764

ANDREW M. SAUL, COMMISSIONER OF
SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a
Telephone Conference on June 23, 2020, the HONORABLE
DAVID E. PEEBLES, United States Magistrate Judge,
Presiding.

A P P E A R A N C E S

(By Telephone)

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Official United States Court Reporter
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1 (The Court and counsel present by telephone.)

2 THE COURT: I have enjoyed working with you on this
3 case and appreciate the excellent written and oral
4 presentations by counsel.

5 Plaintiff has commenced this proceeding pursuant to
6 42 United States Code Sections 405(g) and 1383(c)(3) to
7 challenge an adverse determination by the Commissioner of
8 Social Security, finding that plaintiff was not disabled at
9 the relevant times and therefore ineligible for the benefits
10 for which she's sought.

11 The background is as follows: Plaintiff was born
12 in January of 1974 and is currently 46 years of age.
13 Plaintiff was 40 years old at the alleged date of the onset
14 of her disability on September 1, 2014, and 44, if I can read
15 my notes correctly, at the time of the administrative law
16 judge's decision in August of 2018. Plaintiff is 5 foot --
17 5 feet tall in height and weighs 118 pounds. She is divorced
18 and rents a room in a house in Endicott, New York. The
19 record is equivocal as to whether she previously lived with a
20 boyfriend. There's a suggestion at Dr. Shah's notes that she
21 did and that she was moving out on her own, page 370, and in
22 October 2016 there's an indication on 384 that she was living
23 with her boyfriend. She denied it, however, at the time of
24 the hearing.

25 Plaintiff has a GED. The record is again equivocal

1 as to whether she attended regular or special education
2 classes. In her function report at 177 she indicated regular
3 classes. At page 291 she told Dr. Shah that she was in
4 special education. Plaintiff has one semester of post-high
5 school education in the field of criminal justice. She also
6 underwent tax preparation training. Plaintiff is
7 right-handed. She has a driver's license but no vehicle.
8 Plaintiff stopped work on September 1, 2014. According to
9 her hearing testimony at page 43 she was fired after a
10 disagreement with a supervisor. As the administrative law
11 judge noted, plaintiff has a somewhat sporadic employment
12 history that consists of working in various positions
13 including as a tax preparer, an electronics recycle facility,
14 a cashier and a stock person at several places, mostly could
15 be described as convenience stores, and as a pizza and sub
16 preparation and cook.

17 Physically plaintiff suffers from several diagnosed
18 impairments including neck pain and cervicalgia. There is an
19 indication at page 242 of the administrative transcript she
20 was diagnosed with Lyme disease. She experiences numbness,
21 tingling, pain in her legs, feet swelling, peripheral
22 neuropathy, plantar callous lesions which were excised in
23 March of 2017, and a left foot fracture of a foot bone, the
24 fifth phalanx bone. She also had laser ablation in November
25 of 2017 for the plantar callous lesions.

1 Mentally plaintiff suffers from history of
2 marijuana and crack cocaine abuse. She has apparently
3 maintained sobriety since sometime around 2011. She has been
4 diagnosed with various other mental conditions including
5 bipolar II disorder, post-traumatic stress disorder,
6 agoraphobia with panic disorder, personality disorder, and
7 major depression or major depressive disorder. Plaintiff's
8 mental conditions have been tied, or the suggestion is that
9 they stem from when her husband left her, although she also
10 had some traumatic events earlier, including the fact that
11 her mother died when she was nine years old and that she was
12 sexually abused by her brother, according to 291 of the
13 administrative transcript.

14 In terms of health care providers, plaintiff sees
15 Physician's Assistant Gina Callahan and has since 2013,
16 neurologist Dr. Taseer Minhas, and podiatrist Dr. Angela
17 Freeman. For her mental needs she sees psychiatrist Dr. Arun
18 Shah and has since February 2015. She sees Dr. Shah
19 approximately every three months. She also treats weekly
20 with Therapist Jessica Netherton. The record includes a
21 medical source statement from Dr. Shah given in May of 2018,
22 a medical source statement from Dr. Freeman from April 30,
23 2018, a report of a consultative examination by Dr. Gilbert
24 Jenouri from March 31, 2016, and opinions from Dr. A.
25 Chapman, a psychologist, nonexamining psychologist from March

1 of 2016.

2 In terms of medications, plaintiff has been
3 prescribed Klonopin, Prozac, Zyprexa, Seroquel, BuSpar,
4 Abilify, and Chantix.

5 Plaintiff has a fairly wide range set of activities
6 of daily living. She is able to shower, dress, and groom.
7 She cooks, cleans, does dishes, does laundry, shops one time
8 per month, takes care of 50 house plants. She is able to
9 visit her son in prison, she watches television, she does
10 puzzles, and reads books. Plaintiff is a smoker. She smokes
11 between 10 and 19 cigarettes per day, according to pages 240
12 and 393 of the administrative transcript.

13 Procedurally, plaintiff applied for Title II and
14 Title XVI benefits under the Social Security Act on
15 January 15, 2016, alleging an onset date of September 1,
16 2014. In her function report at page 176 she claimed
17 disability based on bipolar disorder, PTSD, Lyme disease,
18 agoraphobia with panic disorder, swollen hands and feet,
19 joint swelling from Lyme disease. At the hearing when asked
20 about her ability to work, she cited mental health
21 impairments including agoraphobia and left foot issue, at
22 pages 43 and 44, as preventing her from performing
23 work-related functions.

24 On June 21, 2018, a hearing was conducted by
25 Administrative Law Judge Robert A. Lynch to address

1 plaintiff's application for benefits. ALJ Lynch issued an
2 unfavorable decision on August 15, 2018. That became a final
3 determination of the agency on May 3, 2019 when the Social
4 Security Administration Appeals Council denied plaintiff's
5 request for review. This suit was filed on June 27, 2019 and
6 is timely.

7 In his decision, ALJ Lynch applied the familiar
8 five-step test for determining disability.

9 At step one, after first determining that plaintiff
10 was last insured on September 30, 2017, he concluded
11 plaintiff had not engaged in substantial gainful activity
12 since September 1, 2014.

13 At step two, ALJ Lynch concluded the plaintiff does
14 suffer from impairments that impose more than minimal
15 limitations on her ability to perform basic work functions,
16 including mental impairments variously described as both
17 bipolar II disorder, post-traumatic stress disorder,
18 agoraphobia with panic disorder, and personality disorder, as
19 well as, from a physical standpoint, neck pain and
20 cervicalgia and right eye vision loss.

21 At step three, ALJ Lynch concluded that plaintiff's
22 conditions do not meet or medically equal any of the listed
23 presumptively disabling conditions set forth in the
24 Commissioner's Regulations, specifically considering Listings
25 1.02, 2.02, 12.04, 12.06, 12.08, and 12.15. The mental

1 listings were not deemed to have been met since plaintiff did
2 not satisfy either the B or C criteria under those particular
3 listings.

4 ALJ Lynch then determined that plaintiff, despite
5 her impairments, was, retains the residual functional
6 capacity, or RFC, to perform light work with limitations that
7 are specified at pages 21 and 22. Specifically he concludes
8 that plaintiff can lift 20 pounds occasionally and 10 pounds
9 frequently and can stand and/or walk for cumulative total of
10 six hours during an eight-hour workday with ordinary breaks
11 and can sit for a cumulative total of up to eight hours
12 during an eight-hour workday, again, with ordinary breaks.
13 She can occasionally climb ramps and stairs but can never
14 climb ladders and scaffolds. She can occasionally stoop,
15 kneel, and crouch, but can never crawl and can never work in
16 unprotected heights. She cannot perform work that requires
17 her to use upper extremities to reach, handle, finger, or
18 feel on more than a frequent basis. She cannot perform work
19 that requires fine near visual acuity such as assembling very
20 small parts.

21 From a mental standpoint, the RFC finding is that
22 she can perform work that includes moderately complex tasks,
23 further defined as work with an SVP of 4 or less in an
24 environment that does not require interactions with the
25 public and requires no more than occasional and superficial

1 interaction with coworkers and supervisors.

2 Applying that RFC finding, Administrative Law Judge
3 Lynch concluded that plaintiff is indeed capable of
4 performing her past relevant work either as performed by the
5 plaintiff or generally as performed.

6 At step five, ALJ Lynch first noted that if
7 plaintiff could perform a full range of light work, a finding
8 of no disability would be directed by the Vocational
9 Guidelines set forth, or Grids, in the Commissioner's
10 Regulations, and specifically Grid Rule 202.21.

11 Based on the testimony of a vocational expert and a
12 hypothetical posed to that vocational expert, the
13 administrative law judge concluded that notwithstanding the
14 additional nonexertional limitations, plaintiff is capable of
15 performing work in the national economy as a swatch clerk, a
16 packing header, and a blade balancer, and therefore concluded
17 that plaintiff was not disabled at the relevant times.

18 As you know, the standard that the court must apply
19 is extremely deferential. I must determine whether
20 substantial evidence supports the determination of the
21 Commissioner and whether correct legal principles were
22 applied. The Second Circuit noted in *Brault v. Social*
23 *Security Administration Commissioner*, 683 F.3d 443, that this
24 is an exacting standard, more rigorous than the clearly
25 erroneous standard. Substantial evidence, of course, is well

1 defined as such relevant evidence as a reasonable mind might
2 accept as adequate to support a conclusion. The court also
3 noted in *Brault* that the substantial evidence standard means
4 that once an ALJ finds facts, they can be rejected only if a
5 reasonable fact finder would have to conclude otherwise.

6 In this case, plaintiff has raised several
7 contentions, challenging both the physical and mental
8 components of the residual functional capacity finding as
9 lacking in support by substantial evidence, and drilling
10 down, plaintiff challenges the administrative law judge's
11 rejections of opinions from two treating sources, Dr. Shah
12 from a mental point of view and Dr. Freeman, the treating
13 podiatrist. And more generally, the challenge, she
14 challenges the weighing of medical opinions concerning
15 attendance, scheduling, ability to respond to supervisor
16 criticism, off task and absenteeism, and then of course she
17 contends that these errors infected the RFC and therefore the
18 step five reliance on vocational expert testimony.

19 The administrative law judge, as he was required to
20 do, formulated an RFC. As you know, claimant's RFC
21 represents a finding of the range of tasks she is capable of
22 performing, notwithstanding her impairments at issue. An RFC
23 determination is informed by consideration of all of the
24 relevant medical and other evidence as spelled out in 20
25 C.F.R. Sections 404.1545(a)(3) and 416.945(a)(3). The

1 matter's also addressed by the Second Circuit in *Tankisi v.*
2 *Commissioner of Social Security*, 521 F.App'x. 29 from 2013.
3 To properly ascertain an RFC, an ALJ must assess plaintiff's
4 exertional capabilities, as well as nonexertional limitations
5 or impairments. When rendering an RFC determination, the ALJ
6 must specify those functions that claimant is capable of
7 performing without conclusory statements, and of course the
8 RFC determination must in the end be supported by substantial
9 evidence.

10 In this case, the real nub is plaintiff's treating
11 source argument. Ordinarily of course the opinions of
12 treating source regarding the nature and severity of an
13 impairment is entitled to considerable deference if it is
14 supported by medically acceptable clinical and laboratory
15 diagnostic techniques and is not inconsistent with other
16 substantial evidence. Such opinions are not controlling,
17 however, if they are contrary to other substantial evidence
18 in the record, including the opinions of other medical
19 experts. And where the record includes contradictory medical
20 evidence, resolution of such contradictions or conflict is
21 properly entrusted to the Commissioner. The treating source
22 rule really presents a two-step analysis. First the
23 determination must be made as to whether controlling weight
24 is going to be given to the opinion. If it is not, then the
25 ALJ must specify how much, if any, weight is given to the

1 treating source's opinion, applying several factors that have
2 been -- that are included in the regulations and also in the
3 Second Circuit they're referred to as the *Burgess* factors,
4 referenced in *Burgess v. Astrue*, 537 F.3d 117 at 128. Among
5 the factors to be considered are the length of the treatment
6 relationship and the frequency of the examination, the nature
7 and extent of the treatment relationship, the evidence
8 supporting the treating provider's opinion, the degree of
9 consistency between the opinion and the record as a whole,
10 whether the opinion is given by a specialist, and other
11 evidence that has been brought to the attention of the ALJ.
12 The Second Circuit has noted that when an ALJ fails to
13 explicitly consider the *Burgess* factors, remand is not
14 necessarily required if a careful review of the record
15 reveals that the treating source rule was not violated.

16 In this case, the -- first with regards to
17 Dr. Freeman, Dr. Freeman's opinions are treated at page 25 of
18 the administrative transcript and although it is only treated
19 in a paragraph, the -- Dr. Freeman of course limited, at
20 pages 329 and 330, limited plaintiff to standing and walking
21 for less than one hours out of an eight-hour day, something
22 that it's not -- the handwriting is not clear and the
23 administrative law judge made a mistake and thought that that
24 was four hours in an eight-hour workday but nonetheless
25 rejected the limitation. Dr. Freeman also opined that

1 plaintiff would be off task between 20 and 33 percent of the
2 day based upon the chronic foot pain. The administrative law
3 judge again at page 25 rejected that opinion and gave a -- an
4 explanation including the lack of subjective complaints, the
5 lack of documented diagnostic testing, and although the
6 *Burgess* factors are less than adequately outlined in the --
7 in that one paragraph, I conclude the treating source rule is
8 not violated and that a careful review of the record as a
9 whole reflects that the treating source rule was not
10 violated.

11 Dr. Shah is a little bit different situation.
12 Dr. Shah issued a medical source statement on May 9, 2018 at
13 pages 468 and 469 of the administrative transcript finding
14 marked limitations in several areas, including maintain
15 regular attendance without interruptions from psychological
16 symptoms, performing activities within a schedule regarding
17 being punctual and performing at a consistent pace, ability
18 to interact appropriately with the general public, accept
19 instructions and respond appropriately to criticism from
20 supervisors, ability to respond appropriately to ordinary
21 stressors in a work setting with simple tasks, and opined
22 that plaintiff would be off task 20 to 33 percent of the day
23 and absent three days or more per month. Dr. Shah's opinions
24 are discussed by the administrative law judge at several
25 points, 19 and 20 of the administrative transcript, page 23

1 of the administrative transcript, and again, page 24.
2 Pages 19 and 20 and page 24 seem to indicate the weight given
3 and the reasons for the weight being given. I agree with the
4 Commissioner that the speculation as to motives for Dr. Shah
5 to exaggerate plaintiff's limitations being that there was a
6 Social Security Disability claim pending is an appropriate
7 consideration but it was not by any means the appropriate --
8 the only reason cited for rejecting Dr. Shah's opinions. I
9 do note parenthetically that Dr. Shah, a review of his notes
10 at Exhibits 4F and 8F make it abundantly clear that he was
11 well aware of the pendency of the disability application
12 but -- and I also agree with plaintiff and courts that have
13 noted that in mental health cases, the opinions of treating
14 psychiatrists or psychologists with a longitudinal view are
15 important. The Second Circuit noted that in *Ferraro v. Saul*,
16 2020 WL 1189399. But the Second Circuit also in *Ferraro*
17 noted that check-box forms are not always reliable and are
18 somewhat marginally useful. I also agree that psychiatric
19 symptoms can wax and wane.

20 This is perhaps a close case but I think it is
21 distinguishable from both *Stacey* and *Estrella*. In *Estrella*,
22 the Second Circuit noted that the administrative law judge
23 had referenced only two positive treatment notes to support
24 rejection of the treating psychiatrist opinions. The Second
25 Circuit noted that there were many others that were not so

1 promising or positive. In *Stacey*, the Second Circuit noted
2 that the administrative law judge did not rely on or even
3 refer to any of the mental status evaluations in rejecting
4 the doctor's opinion on the issue of the ability to
5 concentrate which was a key issue in that case.

6 The -- it is obviously for the administrative law
7 judge to weigh medical evidence and resolve inconsistencies.
8 Here, the administrative law judge explained the treatment of
9 Dr. Shah. I think that, between the three excerpts that I
10 cited, the *Burgess* factors have been considered. He was
11 referred to as a psychiatrist, he was referred to as treating
12 source, many of his notes were referenced. It was also,
13 supported the opinions, the rejection of Dr. Shah's opinions
14 by the opinions of Dr. Chapman, an agency consultant and an
15 expert, qualified expert in the field of Social Security. I
16 reviewed the treatment notes of Dr. Shah and specifically 4F
17 and 8F exhibits, and I agree with the Commissioner that they
18 portray a much different view of plaintiff who reported
19 symptoms, the improvement with treatment, improvement with
20 medication. At page 370, she's better and has come a long
21 way; 372, described as stable; 382, described as being in a
22 good mood, multiple denials of suicidal or homicidal
23 ideations, references to being alert times three, good
24 attention, good concentration.

25 So in my view, a searching review of the record

1 reflects that even if the treating source rule was violated,
2 the reasons for rejection of the opinion were stated and
3 supported by substantial evidence. I agree with the
4 Commissioner that this is a case that is similar to and
5 supported by Judge Dancks' decision in *Michelle M. v.*
6 *Commissioner of Social Security*, 2020 WL 495170 from the
7 Northern District of New York, January 30, 2020.

8 In terms of the reliance on the opinions of
9 Dr. Chapman, partial reliance, Dr. Chapman issued a medical
10 source statement that found that plaintiff retains the
11 capacity to perform the basic mental demands of unskilled
12 work, that's at page 76. Dr. Chapman found that plaintiff's
13 ability to perform activities within a schedule, maintain
14 regular attendance, and be punctual within customary
15 tolerances was not significantly limited. He also found that
16 the ability to sustain an ordinary routine without special
17 supervision was not significantly limited. He did find that
18 the ability to interact appropriately with the general public
19 was moderately limited, the ability to accept instructions
20 and respond appropriately to criticisms from supervisors was
21 moderately limited, and the ability to respond appropriately
22 to changes in the work setting was moderately limited. In my
23 view the administrative law judge explained why those
24 findings were rejected based on medical evidence, Dr. Shah's
25 notes, plaintiff's activities of daily living, and that is

1 supported by substantial evidence.

2 Turning to the -- turning to the physical RFC, the
3 administrative law judge discussed reasons for rejecting
4 Dr. Freeman's opinions and we discussed that. The
5 administrative law judge addressed the lack of evidence of
6 atrophy, mostly normal physical exams, the findings of
7 Dr. Jenouri and his examination, normal EMG findings, the
8 fact that plaintiff underwent no treatment for peripheral
9 neuropathy, activities of daily living, the normal x-ray of
10 plaintiff's left foot, the lack of evidence of any reduced
11 range of motion, sensory loss or motor loss. The record in
12 my view contains sufficient evidence to assess plaintiff's
13 RFC as a whole, and that the RFC, the physical components of
14 the RFC is supported by substantial evidence, including but
15 not limited to portions of Dr. Jenouri's opinions and
16 findings as well as plaintiff's activities of daily living
17 and the evidence which I just recited. In connection with
18 physical I find that the plaintiff failed to carry her burden
19 of showing greater limitations as it is her burden under
20 *Poupore*, and that this is merely a request to have the court
21 reweigh evidence.

22 And finally, I find that the step five
23 determination was proper, the residual functional capacity
24 was supported by substantial evidence. The vocational expert
25 was posed a hypothetical which tracked the RFC finding, and

1 the Commissioner therefore carried his burden at step five,
2 relying on the testimony of the vocational expert.

3 In conclusion, I believe that correct legal
4 principles were applied and that substantial evidence
5 supports the Commissioner's determination. I will therefore
6 grant judgment on the pleadings to the defendant and order
7 dismissal of plaintiff's complaint. Thank you once again,
8 I've enjoyed working with both of you and I hope you stay
9 safe in these interesting times.

10 MR. GORTON: Thank you, your Honor.

11 MR. MAKAWA: Thank you, your Honor.

12 (Proceedings Adjourned, 11:51 a.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
pursuant to Section 753, Title 28, United States
Code, that the foregoing is a true and correct
transcript of the stenographically reported
proceedings held in the above-entitled matter and
that the transcript page format is in conformance
with the regulations of the Judicial Conference of
the United States.

Dated this 24th day of June, 2020.

/S/ JODI L. HIBBARD

JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter